Supreme Court, U.S.
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No. 97-416

In The

Supreme Court of the United States

October Term, 1997

JERI LYNN THOMPSON and JOSEPH DESHETRES,

Petitioners,

vs.

MICHAEL STEEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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6 pp

Respondent Michael Steen submits this opposition to the Petition for a Writ of Certiorari.

I. STATEMENT OF FACTS

In March 1987, Santa Rosa Police Sergeant Michael Steen was assigned to serve a Search Warrant for narcotics at petitioner Joseph Deshetres' house, which was also believed to be the clubhouse for the Misfit Motorcycle Gang. (App. 7, 73.) The Search Warrant was endorsed for nighttime service due to the danger posed to the officers. (App. 41-2.)

As he prepared to serve the Warrant, Sgt. Steen knew that:

(1) Joseph Deshetres was a member of the Misfit Motorcycle Gang, which had a reputation for drugs and violence (App. 65);

(2) Deshetres had an arrest record dating back fifteen years for various weapon and drug charges; the most recent arrest, for armed robbery, was five years old (App. 65);

(3) Nine years previous to the service of the Warrant, Deshetres had been arrested by the Santa Rosa Police Department while reaching for a handgun (App. 65);

(4) A drug transaction involving methamphetamine was believed to have occurred at Deshetres' house earlier in the week (App. 66).

At 6:15 a.m. on March 17, 1987, Sgt. Steen and other officers drove to Deshetres' house to serve the narcotics

Search Warrant. As they approached the house, the police observed a white pickup truck pull out from the driveway. The officers recognized the truck driver to be Ricky Flowers, a member of the Misfit Gang. Upon seeing the police, Flowers reversed his direction and backed his truck into the driveway. The truck then drove into the roadway a second time, stopped and again backed into the driveway. Flowers then got out of the truck and disappeared on foot towards the rear of the house. (App. 7, 34, 73.)

Upon seeing Misfit Flowers turn back to the house, and fearing premature discovery, Sgt. Steen concluded that rapid entry was necessary when serving the Warrant to provide for officer safety and to prevent destruction of evidence. (App. 53.)

Officer Hemphill gave knock notice at the front door; some seven to ten seconds later, pursuant to Sgt. Steen's instruction, the officers forcibly entered the premises to serve the Warrant. (App. 50, 53.) Deshetres responded to the announced police presence by confronting the police with a gun at which time he was shot by Officer Hemphill. (App. 8, 74-5.)

II. PROCEDURAL HISTORY

Petitioners filed suit pursuant to 42 U.S.C. § 1983 claiming that Sgt. Steen violated their civil rights because he ordered forcible entry to serve the narcotics Search Warrant seven to ten seconds after the knock notice.

Sgt. Steen's pre-trial motion for qualified immunity was denied by the District Court. (App. 81.) Following an

interlocutory appeal, the Ninth Circuit ("Panel I"), consisting of Judges Schroeder, Reinhardt and Kleinfeld, affirmed the denial of qualified immunity in an unsigned, unpublished memorandum. (App. 24.) Panel I concluded its memorandum by emphasizing:

> "The result of our affirmance on this interlocutory appeal of the district court's denial of a summary judgment motion based upon qualified immunity issue [sic] is to return the qualified immunity issue to the district court for determination on its merits. We express no view on those merits here. . . . " (App. 28.)

The case returned to the District Court for a jury trial. (App. 102.) Following the jury's verdict, Sgt. Steen filed a Rule 50(b) motion seeking qualified immunity. (App. 103.) Petitioners opposed the motion, asserting that the Ninth Circuit (Panel I) decision was law of the case and thus foreclosed any further qualified immunity inquiry. The District Court disagreed:

> "[P]laintiff is incorrect in asserting that this Court's prior decision has been somehow set in stone by the Ninth Circuit. The Ninth Circuit ruling denying defendant Steen's interlocutory appeal stated that the result of its ruling was 'to return the qualified immunity issue to the District Court for determination on its merits.' " (App. 107.)

Nonetheless, the District Court denied Sgt. Steen qualified immunity. (App. 109.) Sgt. Steen appealed. (App. 123-25.) The Ninth Circuit panel ("Panel II") which considered the appeal consisted of Judges Alarcon, Kleinfeld and Hawkins. (App. 1.) After reviewing the facts of

the case, Panel II analyzed the reasonableness of Sgt. Steen's decision to order rapid entry to serve the Warrant:

> "In this case, Sergeant Steen could reasonably conclude that in light of Deshetres' past and the likelihood he had been tipped off to the raid, immediate entry was needed to reduce the risk that the police would be met with violent resistance." (App. 20.)

The Ninth Circuit then addressed the issue of qualified immunity:

> "The question on qualified immunity is not whether Sergeant Steen's judgment was mistaken, only whether a reasonable officer could have made the judgment to enter as these officers did in these particular circumstances. He could have." (App. 20.)

For that reason, the Ninth Circuit (Panel II) reversed the District Court's decision and held that Sgt. Steen was entitled to qualified immunity as a matter of law. (App. 20-21.) As Panel II explained:

> "[W]e do not see how this conclusion can be avoided. The findings of fact of the District Court, in the particular circumstances of this case, compel it." (App. 19.)

Petitioners object, claiming that Panel II was prohibited from reaching this decision because the Panel I decision was law of the case. In making this assertion, petitioners overlook the fact that Panel I expressly held that it was not reaching the merits of the qualified immunity issue. (App. 28.) As a result, the Panel I memorandum did not purport to be law of the case, a fact

recognized by the District Court (App. 107), and Panel II (App. 15).

Petitioners also overlook the fact that Judge Kleinfeld was a member of Panel I (App. 24) and was the author of the Panel II decision (App. 7). Thus, Judge Kleinfeld was in the best position to know the intent of the prior Panel decision when he concluded on behalf of Panel II: "[n]o law of the case issue arises, because our previous disposition left open the issues we resolve today." (App. 15.)

In short, Panel II did what Panel I did not: it reached the merits of the qualified immunity issue, holding that Sgt. Steen was entitled to qualified immunity as a matter of law.

III. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: October 8, 1997.

Respectfully submitted.

RENÉ AUGUSTE CHOUTEAU
Attorney for Respondent
Michael Steen